Award No. 696
Docket No. DC-689

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Wm. H. Spencer, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: "Request of Steward Sam Adelson, et al., for rates of pay in consonance with their years of service as measured from date of first service, or seniority standing and with retroactive adjustment of compensation to those not rightfully and properly paid."

EMPLOYES' STATEMENT OF FACTS: "Steward Adelson has seniority date of May 8, 1929; however, after having been in service nearly eight (8) years he was receiving compensation based on fifth years' service. Request was made (April 16, 1937) that this rate of pay be adjusted upward in consonance with years in service as measured from May 8, 1929. This request was denied by the Carrier; therefore, the case comes before the National Railroad Adjustment Board, Division Three."

POSITION OF EMPLOYES: "This case arises under Rules 1, and Rule 11, Section (a) of Agreement covering pay and regulations for Dining Car Stewards, effective July 1st, 1936, reading:

'RATES OF PAY

'Rule 1	Monthly Rate	Hourly Rate
Dining car Stewards		
1st year's service	$135.00	.5625
2nd " "	145.00	.6050
3rd " "	150.00	.6250
4th " "	155.00	.6450
5th " "	160.00	.6675
6th " "	165.00	.6875
7th " " and after	175.00	.7300
Cafe Car Stewards	135.00	.5625

'NOTE.—A Dining Car Steward entering or re-entering the service, who has had one or more years accumulated experience, will initially be allowed the second year rate.'

"The above rates effective October 1st, 1937 were each increased $13.20 per month, and 5½c per hour.

'Seniority Rosters.

'Rule 11. (a) Seniority as Steward begins on the date such service is first performed on the seniority district.'

"The Carrier arbitrarily has interpreted Rule 1 and its application to be as follows—(quoting from letter 8-20-37 Carrier to General Chairman):

than an accumulative experience basis in determining progressive rates of pay for the other periods of service.

"An employe's value to the Carrier as a dining car or cafe car steward, is proportional to the cumulative experience he has had in that capacity. For that reason the use of cumulative experience as a basis of determination of the applicable progressive rate is equitable and well established, not only on this but on other railroad properties.

"The use of dining car and cafe car stewards' seniority dates as a means of determining the applicable progressive rate would be unfair to the employes as well as to the Carrier. As an example, under Rule 16 of the Dining Car Stewards' Current Agreement a steward who has been in service for 5 years may be granted a leave of absence for an entire year (with seniority unimpaired) and during that year he may accept a position of any character (other than work on another railroad) or he may remain idle. Let us assume that a steward with 5 years service takes a leave of absence for one year during which time he engaged in carpentry work. Under the Petitioner's contention such an employe would, on his return, be credited (in determining his progressive rate) with a full year's service as a dining car steward while he was engaged as a carpenter and when he resumed service he would automatically receive the 7th year's rate of pay, although he actually performed only five years cumulative work as a dining car steward, whereas another employe having completed four full years service as a dining car steward at the time the former employe started on leave of absence would actually have completed five full years service at the time the former employe returned from leave of absence (the same cumulative dining car steward's experience for both stewards) and yet he would, starting with the time the former employe returned to work, receive only the 6th year's rate of pay, whereas, the former employe would receive the 7th year's rate.

"The practice, of the Carrier, in determining the applicable progressive rate, as outlined herein, has been in effect generally on other railroads for many years and it has been accepted as a correct basis of remuneration.

"The Carrier requests the Board to deny the claim because of lack of jurisdiction, on the grounds that a change in rules of Dining Car Stewards' Current Agreement is being requested by the Petitioner and that an award in favor of the Petitioner would change the rules of said agreement, and, further, because no evidence has been submitted reflecting a violation of the Stewards' Current Agreement."

OPINION OF BOARD: The disposition of this controversy turns upon the construction which is placed on the language of Rule 1 of the agreement between the parties. The rule first sets forth progressive rates of pay to be applied in terms of a given employee's years of service. This schedule of rates is then followed by this note:

> "A Dining Car Steward entering or reentering the service, who has had one or more years accumulated experience, will initially be allowed the second year rate."

The Carrier contends that the yardstick of "cumulative experience" referred to in the note must be read into the term **service** as used in the schedule of rates. The petitioner contends that the progressive rates should be based upon years of service as determined by seniority, and not upon cumulative experience.

Both parties cited and relied upon Article IV of Supplement 27 to General Order 27 in support of their respective positions. This article, which significantly enough, is headed, "Entering or Reentering Service Rate," states:

"Employes with more than one year's cumulative experience in the class of service in which they are to engage at the time of entering or reentering that service will receive as a starting rate the compensation specified in Article II for one year to two years' service. Progressive rates dating from last time employed shall be applied thereafter. Seniority in service to date from date of last time employed."

It will be noted that this phraseology is for all practical purposes the same as that contained in Rule 1 of the agreement involved in this dispute. It follows that this portion of Supplement 27 to General Order 27 is not very helpful in determining the proper construction to be placed on the rule involved in this dispute.

Rule 1, without the appended note, would certainly have to be construed to mean that the progressive rates of pay would have to be based upon years of service as determined by the seniority of a given employee. The note clearly and unmistakably refers solely to the rate of pay to be applied when an employee enters or reenters the service. There is, therefore, no justification for permitting this note to limit the construction which, in its absence, would have to be placed upon the rule in question.

The carrier also insists that regardless of the logic of the interpretation requested by the petitioner, the parties by long practice under the agreement of January 1, 1929, have already adopted the test of cumulative experience as a guide in the application of the progressive rates of pay set forth in Rule 1 which is the same as Rule 1 of the agreement of 1929. It is to be remembered, however, that the agreement involved in this dispute is an agreement between the carrier and the Brotherhood of Railroad Trainmen, whereas the agreement of 1929 was one between the carrier and an entirely different labor organization. Practice under the prior agreement is not a safe guide for the interpretation of the agreement although the language of Rule 1 in dispute here is precisely the same as the language of Rule 1 of the earlier agreement.

In view of the special circumstances of this dispute, the readjustments in the rates of pay involved should not ante-date the period on which the claimants respectively made their claims.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934:

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the carrier misapplied the rule of the agreement between the parties in the payment of the claimants herein.

AWARD

The claim is sustained as to Steward Adelson and Steward Jacobi in accord with the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of July, 1938.

DISSENT ON AWARD NO. 696, DOCKET DC-689

Since we are convinced that the majority do not properly interpret the contract, but arrive at a result completely destructive of its manifest intention, we dissent.

The crucial issue in this case is: Did the parties to the contract, when they used the term "service" in Rule 1, mean "seniority"? Both terms are carefully used in different connections throughout the contract. The preamble cites that the agreement covers "rates of pay and rules governing the **hours of service** and working conditions of . . . Dining Car and Cafe Car Stewards." Rule 1 makes rates of pay of stewards dependent upon years of **service.** Rule 2 has to do with hours of **service,** dealing with readiness for **service** the entire month, special **service,** regular and extra **service, service** trips. Rule 4 (b) deals with a steward required to perform **service** outside his regular assignment. Rule 6 (a) deals with extra boards performing extra **service.**

It is not until Rule 8 that the contract mentions "seniority." Rule 8 makes seniority govern rights to assignments, subject to fitness and ability; Rule 9 provides for seniority districts; Rule 10 deals with overlapping and extra assignments; and Rule 11 defines seniority in such a way that any possible doubt that **service** and **seniority** have different meanings, is destroyed: "Seniority . . . begins on the date **such service is first performed.**"

Seniority and service are two different things, used with different meanings, and to express different ideas. A result making the terms synonymous is not possible if any effect is to be given to the intention as gathered from the four corners of the contract.

The agreement expresses its definition of service. When "returned to service" from exercising official duties under leave of absence (Rule 17), a steward's seniority is unimpaired; but he has been out of service and "returned." **Service** is "work done by one person at the request of another." **Boyd** v. **Gorman,** 157 N. Y. 365, 52 N. E. 113.

If there were any ambiguity—and we submit there is none—the history of the rule may be looked to.

The first general regulations promulgated covering dining car stewards were contained in Supplement 18 to General Order 27 issued during the period of Federal Control by the Director General of Railroads, effective January 1, 1919.

That Supplement was superseded by Supplement 27 to General Order 27, issued by the Director General effective February 1, 1920.

Supplement 27 to General Order 27, insofar as that order related to progressive rates for dining car stewards, was no different from Supplement 18; therefore, all necessary purposes will be served in referring only to Supplement 27 to General Order 27.

Supplement 27, in Article II, captioned "Rates of Pay," was as follows:

"ARTICLE II—RATES OF PAY

(a) For dining car, buffet, cafe, and club car employes named below, establish basic minimum monthly rates as follows, and to these basic minimum rates and all rates per month in excess thereof in effect as of January 1, 1918, prior to the application of General Order No. 27, add twenty-five (25) dollars per month, establishing minimum rates per month as follows:

	Basic minimum Jan. 1, 1918, prior to application of General Order No. 27	minimum New	Rate per hour (cents)
Stewards, for the first year's service	$ 90.00	$115.00	0.48
Stewards, over 1 year to 2 years' service	100.00	125.00	.5225
Stewards, over 2 years' to 5 years' service	105.00	130.00	.5425
Stewards, over 5 years' to 10 years' service	110.00	135.00	.5625
Stewards, over 10 years' to 15 years' service	115.00	140.00	.585
Stewards, over 15 years' service	120.00	145.00	.605"

(We quote only the portion of the tabulation applying to stewards.)

Articles IV and V, Supplement 27, read as follows:

"Articles IV—ENTERING OR REENTERING SERVICE RATE

Employes with more than one year's cumulative experience in the class of service in which they are to engage at the time of entering or reentering that service will receive as a starting rate the compensation specified in Article II for over one year to two years' service. Progressive rates dating from last time employed shall be applied thereafter. Seniority in service to date from date of last time employed.

"ARTICLE V—PROGRESSIVE SCALE OF WAGES

Where progressive periods of service are in effect which are at variance with the one herein provided, such periods shall be changed to conform with the one herein established. Where higher rates are preserved by Article X hereof, the compensation of employes will be continued at such higher rates until the next period of service absorbing the higher rate is reached, when the rate provided by Article II hereof shall be applied."

This carrier entered into an agreement with its dining car stewards, effective January 1, 1929, which provided:

"RULE 2—

(a)—Stewards with more than one year's cumulative experience in the class of work in which they are about to engage, at the time of entering or re-entering the service, will receive as a starting rate the compensation for second year's service, and progressive rates thereafter.

"RULE 9—

Salaries shall be progressive as follows:

	Per Month	Per Hour
First year	$135.00	56¼c
Second year	145.00	60⅛c
Third year	150.00	62½c
Fourth and fifth years	150.00	62½c
Beginning with sixth year and subsequent thereto	165.00	68¾c"

That agreement continued the rates of pay for dining car stewards on a progressive basis, as did Supplement 27.

The agreement of January 1, 1929, continued in effect until the current agreement of July 1, 1936.

The petitioner, the Brotherhood of Railroad Trainmen, sometime prior to the 28th day of January, 1936, secured from the dining car stewards employed by this carrier authority to represent them in dealing with the management.

By an agreement dated January 28, 1936, the B. of R. T. organization was recognized by the carrier as the authorized representative of the dining car stewards. This written agreement provided for the continuance of the wage agreement of January 1, 1929.

The parties subsequently negotiated the agreement of July 1, 1936, now in effect.

The Opinion recognizes that the progressive rates of pay set forth in Rule 1 of the current agreement, are identical in principle with the provisions of the agreement of January 1, 1929. The seniority rules, having nothing to do with rates of pay, but only with rights of employes as between themselves to preferred runs, were separately provided for from the beginning.

The origin of the rules thus reflects clearly that a steward's pay is graded by his service as distinguished from his seniority, confirming the meaning clearly manifested by the rules themselves. There is further confirmation of this conclusion in the understanding of the parties to the contract. Indeed, the carrier proved beyond doubt, and there was not even effort to rebut the proof, that the interpretation on its line has been the universal interpretation of the term **service** in the application of the Supplements to General Order No. 27 issued by the Federal Railroad Administration and in similar contracts on other railrods.

The language to be interpreted was the contract of July 1, 1936, which is without material variation from the contract of January 1, 1929. The uniform application under the 1929 contract was as contended by the carrier, and no employe protested. Neither did the representatives of the employes protest. All parties at interest understood what was meant; and every employe here involved originally entered into and continued his individual employment relationship with the carrier with the language and its then-agreed meaning in mind. The bargaining agency for the employes was changed; But the agreement was not in any particular here materially altered. The contract and its agreed meaning were not changed. The employes continued in employment without protest until the first claim for a different application was asserted by Adelson on April 16, 1937—9½ months after the current agreement became effective. Claim for Jacobi was not asserted until June 3, 1937—11 months after the effective date of the current agreement.

That a change in bargaining agencies does not affect the contract is upheld in **Brisbin v. E. L. Oliver Lodge No. 335, B. R. C. et al.**, 279 N. W. 276, 286 (Supt. Ct. Neb.):

> "The substitution, therefore, of the brotherhood, for the association, had no effect whatever on the married women's contract, and the brotherhood succeded to all the rights of the association to invoke the enforcement of the contract against the plaintiff. The married women's agreement was made by the Clerical Employes' Association in a representative capacity for the benefit of all the clerical employes, and when it was put in force the employes naturally acquiesced in such agreement, and it became a part of the contract of employment until the agreement itself, and not the agency from which the agree-

ment was made, was changed. Unless this were true, there could be no such thing as collective bargaining in any industry."

The contracts are, therefore, between the employes and the carrier. The parties to the contracts have not changed, merely the bargaining agency for one of the parties. The terms of the agreement relating to the progressive rates on which this case turns have not been changed; and their meaning has been fixed by long and harmonious action of the parties. When there is doubt as to the meaning of language, "It is to be assumed that parties to a contract know best what was meant by its terms, and are the least likely to be mistaken as to its intention; that each party is alert to protect his own interests and to insist on his own rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it to be." (12 Am. Jur. 793.)

A further point may be made. In interpreting contracts, tribunals should give the parties credit for sanity of purpose. A reasonable interpretation should be given, and not an absurd one. The carrier has shown the absurd results which will follow the interpretation which has by this award been adopted by the majority.

This is also exemplified in case covered by Docket DC-693, Award 697, rendered at the same time, and to which this dissent will also apply. Turner, the claimant in that case, entered the service of the carrier without previous experience as a dining car steward, June 19, 1929, remaining in service until January 14, 1932, or 2½ years, when he was cut off in reduction of force. He did not thereafter engage in railway service until reemployed by the carrier on October 29, 1936, at which time he was operating a gasoline filling station, and served as a steward for the carrier only in emergencies when regular stewards laid off. He left the service by resignation September 16, 1937. He actually served as a steward less than three years, yet the contention in his behalf by the petitioner was for the rate which is applicable only to stewards with six years' service.

The whole theory and purpose of the application of progressive rates based upon cumulative experience would be entirely nullified if seniority were used as the basis. The basic foundation for progressive rates for dining car stewards is upon the well-known fact that as a dining car steward's experience accumulates, the quality of his service should enhance.

The Opinion first states that since Article IV of Supplement No. 27 and some of the language of Rule 1 are practically the same, it "follows" that the language of such article is "not very helpful . . ," a perfect **non-sequitur.** It means nothing to the majority that the supplements are the origin of the rule at issue; that the meaning thereof, including that of Article V, not mentioned by the referee, is not susceptible of two constructions; that the very language unequivocally used and as plainly construed in the supplements has been continued into the rule to be construed and has had a meaning on the Southern Pacific, as well as other railroads, which was not misunderstood or challenged until complaints in the present case and in Docket DC-693, Award 697, were filed.

The second step in the award is a holding that the note to Rule 1 should not "limit the construction which, in its absence, would have been placed upon the rule in question." The note is only one element found in the contract. It gives plain evidence, elsewhere unmistakably corroborated, that the purpose of the progressive scale of pay is to increase the rate in accord with experience as a steward, which increases the value of service as such to a carrier. True, the note should not be allowed to overrule any plain language contradicting the evidence of purpose the note affords; but this principle is no justification, when no plain contradictory language is found, to do violence to the very plain language of Rule 1 and the very plain intent of the contract.

The third step in the award is a holding that long practice is not necessarily a bar to an award for the employes. It holds, though language well understood by the carrier and its employes was simply carried forward, though in adopting it the Brotherhood kept silent as to any thought that rules were being changed by use of the same old words, the rules were changed because a new bargaining agency was substituted! If the Brotherhood had any thought of imputing a new meaning to the old words and thereby changing the carrier's obligations, its failure to make known its thoughts during the negotiations is a challenge to its good faith, and vitiates utterly its contention now that such a result was accomplished.

In the three steps of the award, the majority simply say that an award is not precluded by the three objections considered, but do not give any valid reasons why an award for the claimants should be rendered. There is no logical analysis of the contract to find the intent thereof; no showing of the history of the rule, the application by the parties, the purpose apparent from the contract, or that any employe rights have been violated. A process such as this results in taking properly, not in the exercise of the judicial function delegated to this Division, but capriciously and without legal justification.

/s/ J. G. TORIAN
/s/ C. C. COOK
/s/ A. H. JONES
/s/ R. H. ALLISON
/s/ GEO. H. DUGAN